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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

NO. 79-5175

RANDALL DALE ADAMS,

Petitioner

V.

THE STATE OF TEXAS,

Respondent

ON WRIT OF CERTIORARI TO THE
TEXAS COURT OF CRIMINAL APPEALS

BRIEF FOR THE RESPONDENT

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OPINION BELOW

The opinion of the Texas Court of Criminal Appeals (A. 56)[1] is reported at 577 S.W.2d 717.

JURISDICTION

Petitioner's jurisdictional statement (Brief for the Petitioner at 1-2) is acceptable.

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[1]For convenience, Respondent, like Petitioner, will cite the Appendix as "A" and the transcript of voir dire examination as "VD", adding a reference to the Appendix if any portion of the voir dire examination cited also appears therein.

QUESTIONS PRESENTED

I. IS THE DOCTRINE OF *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968), APPLICABLE TO THE BIFURCATED PROCEDURE EMPLOYED BY TEXAS IN CAPITAL CASES?

II. DID THE EXCLUSION FROM JURY SERVICE IN THE PRESENT CASE OF PROSPECTIVE JURORS PURSUANT TO TEX. PENAL CODE ANN. §12.31(b) (VERNON) VIOLATE THE DOCTRINE OF *WITHERSPOON V. ILLINOIS?*

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner cites and sets forth a portion of the Sixth and Fourteenth Amendments to the United States Constitution.

Also involved are Tex.Penal Code Ann. §§12.31, 19.02, and 19.03 (Vernon); and Tex.Code Crim.Proc. Ann. arts. 35.15, 35.16, 35.17, and 37.071 (Vernon). These statutes are set forth below.

Tex. Penal Code Ann.

Sec. 12.31. Capital Felony. (a) An individual adjudged guilty of a capital felony shall be punished by confinement in the Texas Department of Corrections for life or by death.

(b) Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of a capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Sec. 19.02. Murder. (a) A person commits an offense if he:

(1) intentionally or knowingly causes the death of an individual;

(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of individual; or

(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

(b) An offense under this section is a felony of the first degree.

Sec. 19.03. Capital Murder. (a) A person commits an offense if he commits murder as defined under Section 19.02 (a)(1) of this code and:

(1) the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman:

(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape, or arson;

(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;

(4) the person commits the murder while escaping or attempting to escape from a penal institution; or

(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.
(b) An offense under this section is a capital felony.
(c) If the jury does not find beyond a reasonable doubt that the defendant is guilty of an offense under this section, he may be convicted of murder or of any other lesser included offense.

Tex. Code Crim. Proc. Ann.

ART. 35.15. Number of challenges. (a) In capital cases both the State and defendant shall be entitled to fifteen peremptory challenges. Where two or more defendants are tried together, the State shall be entitled to eight peremptory challenges for each defendant; and each defendant shall be entitled to eight peremptory challenges.

(b) In non-capital felony cases, the State and defendant shall each be entitled to ten peremptory challenges. If two or more defendants are tried together each defendant shall be entitled to six peremptory challenges and the State to six for each defendant.

(c) The State and the defendant shall each be entitled to five peremptory challenges in a misdemeanor tried in the district court and to three in the county court, or county court at law. If two or more defendants are tried together, each defendant shall be entitled to three such challenges and the State to three for each defendant in either court.

ART. 35.16. Reasons for challenge for cause. (a) A challenge for cause is an objection made to a particular juror. alleging some fact which renders him incapable or unfit to serve on the jury. A challenge for cause may be made by either the state or the defense for any one of the following reasons:

1. That he is not a qualified voter in the state and

county under the Constitution and Laws of the State; provided, however, the failure to pay a poll tax or register to vote shall not be a disqualification;

2. That he has been convicted of theft or any felony.

3. That he is under indictment or other legal accusation for theft or any felony;

4. That he is insane or has such defect in the organs of feeling or hearing, or such bodily or mental defect or disease as to render him unfit for jury service, or that he is legally blind and either the court or the state in its discretion or the defendant or the prospective juror in his discretion is not satisfied that he is fit for jury service in that particular case;

5. That he is a witness in the case.

6. That he served on the grand jury which found the indictment;

7. That he served on a petit jury in a former trial of the same case;

8. That he has a bias or prejudice in favor of or against the defendant;

9. That from hearsay, or otherwise, there is established in the mind of the juror such a conclusion as to the guilt or innocence of the defendant as would influence him in his action in finding a verdict. To ascertain whether this cause of challenge exists, the juror shall first be asked whether, in his opinion, the conclusion so established will influence his verdict. If he answers in the affirmative, he shall be discharged without further interrogation by either party or the court. If he answers in the negative, he shall be further examined as to how his conclusion was formed, and the extent to which it will affect his action; and, if it appears to have been formed from reading newspaper accounts,

communications, statements or reports or mere rumer or hearsay, and if the juror states that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, the court, if satisfied that he is impartial and will render such verdict, may, in its discretion, admit him as competent to serve in such case. If the court, in its discretion, is not satisfied that he is impartial, the juror shall be discharged;

10. That he cannot read or write.

No juror shall be impaneled when it appears that he is subject to the second, third or fourth grounds of challenge for cause set forth above, although both parties may consent. All other grounds for challenge may be waived by the party or parties in whose favor such grounds of challenge exist.

In this subsection, "legally blind" shall mean having not more than 20/200 of visual acuity in the better eye with correcting lenses, or visual acuity greater than 20/200 but with a limitation in the field of vision such that the widest diameter of the visual field subtends an angle no greater that 20 degrees.

(b) A challenge for cause may be made by the State for any of the following reasons:

1. That the juror has conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where the State is seeking the death penalty;

2. That he is related within the third degree of consanguinity or affinity to the defendant; and

3. That he has a bias or prejudice against any phase of the law upon which the State is entitled to rely for conviction or punishment.

(c) A challenge for cause may be made by the defense for any of the following reasons:

1. That he is related within the third degree of consanguinity or affinity to the person injured by the commission of the offense, or to any prosecutor in the case; and

2. That he has a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor.

ART. 35.17. Voir dire examination. 1. When the Court in its discretion so directs, except as provided in Section 2, the state and defendant shall conduct the voir dire examination of prospective jurors in the presence of the entire panel.

2. In a capital felony case, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion. Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court.

ART. 37.071. Procedure in capital case. (a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall

not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

STATEMENT OF THE CASE

The Crime

The facts of the offense were correctly stated by the Texas Court of Criminal Appeals:

"Appellant was found guilty of the murder of Dallas police officer Robert Wood, who was fatally shot by the driver of an automobile he had stopped for failing to have on its headlights. The shooting occurred at approximately 12:30 a.m. on November 28, 1976, in the 3400 block of North Hampton Road in Dallas.

"The State's principal witness was David Harris, who at the time of the offense and trial was sixteen years of age. Harris testified that he ran away from his home in Vidor on November 26, 1976, after stealing money and a car from the house of a neighbor. He also took with him a .22 caliber pistol and ammunition.

"Harris drove to Houston, where he spent the night in a shopping center parking lot. On the morning of November 27, Harris drove to Dallas. In Dallas, Harris picked up appellant, who was hitchhiking. Harris and appellant spent the afternoon and evening of November 27 riding around Dallas in the car Harris had stolen, smoking marihuana and drinking beer. That night they went to a drive-in movie.

"Harris and appellant left the movie at approximately midnight. Appellant was driving. As they drove south on the street Harris later identified as Hampton Road toward the motel at which appellant was living, they were stopped by a police patrol car. Harris, fearing that he would be identified, slumped down in the front seat so that he would not be seen. As the officer, Robert Wood, approached the driver's window of the car, appellant reached under the front seat where he knew the pistol was located, removed the pistol, shot the officer several times, and rapidly drove away.

"After the shooting, appellant drove to his motel, where he and Harris separated. Harris spent the rest of the night in a parking lot, and then returned to Vidor. Harris spent the next several days with friends, to whom he stated that he had shot a Dallas police officer. Harris testified that he made this claim in an effort to impress his friends. Harris was arrested on December 5, 1976, for the theft of the car and was released to the custody of his parents. He was rearrested on December 20, after the Vidor police learned of the incriminating statements he had made with regard to the Dallas murder. Following this arrest, Harris gave a statement detailing his activities in Dallas and identifying appellant as the person who shot Wood.

"Appellant, in his testimony, admitted spending the day of November 27 with Harris. But appellant claimed that he and Harris left the movie at approximately 9:30 p.m. and that they separated at a convenience store next door to his motel. Appellant testified that he returned to his motel room no later than 10:00 p.m. and was asleep there at the time of the murder. Appellant's defensive theory was that Harris had shot Wood and was attempting to shift the blame to him."

* * *

"Officer Teresa Turko was Wood's partner. Turko

testified that she was standing near the right rear corner of the assailant's car at the time Wood was shot and that she saw only one person in the car. Turko could not identify this person since she saw only the back of his head, but she did testify that appellant's hair was the same color and worn in the same style as that of the man in the car. Turko also testified that Harris' hair was not similar in either color or style to that of the man she saw."

Adams v. State, 577 S.W.2d 717, 719, 721 (Tex.Crim.App. 1979). (A. 57-58, 61).

The Voir Dire Examination

Both the trial judge and the prosecutor carefully explained to each prospective juror the Texas law regarding capital punishment. After preliminary questioning, each venireman was informed of the nature of the case and the sentencing procedures prescribed by Texas law following a finding of guilt in the first stage of the bifurcated proceedings. Generally, even those jurors who were unalterably opposed to the death penalty and who stated that under no circumstances could they ever vote to inflict it were not excused on the basis of *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Instead, the focal point of the inquiry was Tex. Penal Code Ann. §12.31(b) (Vernon). Typically, if a juror expressed his inability to impose the death penalty, he was not excused for cause unless it were also determined that he was unable to honestly and in an unbiased manner answer the fact questions that he was informed would automatically result in the imposition of the death penalty or life imprisonment.

Other jurors, who were not disqualified under the *Witherspoon* doctrine and even stated that they were in favor of the death penalty, were unable to take the oath prescribed by §12.31(b). A careful reading of the voir dire examination reveals that the inability of such a juror to take the statutory oath and thereby escape disqualification was a result of the juror's inability to assure the defense and the prosecution that he would

answer the three fact questions at the punishment stage of trial truthfully, and in accordance with the evidence adduced, even though he was aware that such an answer would automatically result in a sentencing result possibly abhorred by the juror -- whether death or life imprisonment. These jurors, that is, were unable to swear that their discretion in sentencing would be guided in the manner prescribed by the Texas law.

Thus, in many instances §12.31(b) was used as a means of *rehabilitating* jurors who could have been disqualified under *Witherspoon.* In other instances it was used as an alternative means of excluding jurors in addition to *Witherspoon.* In still other cases, it was the sole basis of exclusion. Petitioner has apparently selected ten jurors for challenge herein that he perceives as examples of the last group.

Mrs. Francis Mahon (VD 33; A.3).

Mrs. Mahon stated that she had always favored the death penalty "in certain types of cases" and that she had always been in favor of it. (VD 34; A. 3-4).

The prosecutor carefully explained the Texas sentencing procedures and the three statutory questions at the punishment phase of the trial. (VD 55-60). As frequently occurred during the voir dire examination, the trial judge did not hesitate to assist both the prosecutor and defense counsel in explaining the law when he felt that such an explanation might clarify matters for a venireman. There is no contention that any of the law was explained inaccurately to Mrs. Mahon or any other juror. (*E.g.*, VD 56). Both the judge and prosecutor explained that the Texas jury at punishment in a capital case only answers fact questions; it is "the Judge [who] must do the sentencing depending upon

what the jury's answers are," (VD 55), and that "the law", not the jury, fixes the punishment. (VD 56).

A second common pattern in voir dire examination is illustrated by the prosecutor's long hypothetical question to Mrs. Mahon. (VD 61-64; A. 4-5). Essentially, the prosecutor explained that a venireman was not qualified to sit on the jury unless he could also swear that he would answer the fact questions at the punishment stage of the trial truthfully, even though the juror also knew that he disagreed with the result that the law automatically attached to those answers:

Q: [By the prosecutor] But let me put you in a situation here and you tell me how you feel.

Let's assume that you listen to the evidence of a case, you were convinced from the evidence as were the other eleven jurors, that the Defendant was guilty, you found him guilty of capital murder. You now know that there's only one of two possible punishments, either the sentence of death or a sentence of life. You know that you're going to be asked those three questions at the close of the evidence in the Hearing. You listen to all the evidence in the second Hearing. You're convinced from the evidence presented to you in the trial that number one, he did act deliberately. Number two, there is this probability that he will commit future criminal acts of violence, based upon the evidence presented, and number three, you're convinced that he did act unreasonably in killing this victim, the evidence has convinced you of that. Therefore, the proper answers to these three questions would be yes, would it not?

A: [By Mrs. Mahon] At this point, I think yes. I don't know whether I would at a time like that,

would weigh the death penalty over life or not. I'm really -- I really just don't know.

Q: I'm coming to that in just a minute and I appreciate your candor on it. But are we to the point where in my hypothetical situation, are we to the point to where you're convinced that the evidence shows that the proper answers to those questions is yes, one, two, three?

A: Yes, I'm to that point.

Q: That's been proven. All right. But let's suppose on the other hand your own personal feelings were, for some reason known only to you, your own personal feelings, were that this man should not get the death penalty?

A: Well, there would have to be something that would give me that feeling, I think.

Q: Well, I don't know that there would be any cause for us to speculate right now but can you see where that might happen?

A: Well, it could happen, you know it could happen.

(VD 61-63; A. 4-5).

Mrs. Mahon had difficulty promising that her discretion at punishment would be guided by the factors enumerated in Texas law. She first stated that she believed she could answer the questions honestly (*id.*); upon further questioning, however, she said, "It might be difficult to disregard [the effects of my answers]" (VD 64; A.6); "Maybe I'll have to search me a little," (VD 65; A.7); and "I really do not know whether it would effect [sic] me or not when it came right down to it," (VD 67; A. 7-8). She finally concluded that she was unable to take an oath that she would be uninfluenced in the

manner proscribed by Texas law. (VD 70; A. 9). *Mr. Mr. Forrest J. Jenson* VD 348; A. 9).

Jenson was in favor of the death penalty because "I do feel that society has to have some deterrent to crime and as a result, probably capital punishment is the only means of deterrent that we have." (VD 351; A. 9). He did say, however, that he would "probably" have to classify himself within the group of persons who because of their experience, "personally could not be one to take pen in hand and write their name on that verdict form sentencing somebody to his death," (VD 352-53), as the prosecutor phrased it. Later, the prosecutor explained the sentencing scheme so that Jenson would understand that if he were selected for jury service, he would not actually vote for death, but would answer questions, and that "three yes answers qualifies a mandate to the Court to sentence the man to death," (VD 357). Subsequently in an effort to ascertain whether Mr. Jenson could take the statutory oath to honestly answer the fact questions in spite of his knowledge of the consequences, the prosecutor explained in unmistakable terms the moral dilemma that Jenson might face:

> Now, the dilemma comes when a juror, such as yourself or any other juror, may hear the case and may feel the Defendant is guilty but feels that this is the furtherest thing from a death penalty case, that I never -- this is not what I had in mind when I was thinking about a proper case for the death penalty. Never had something like this in mind. And, if allowed to, I would never vote for death in this case. And yet, I honestly feel the answers to the three questions should be yes, yes, yes. And so there is that personal conflict that you can find yourself in. It's a very real probability.
>
> * * *
>
> [I]n other words, in good conscious [sic] if you felt

like the guy should not die in the electric chair, then your conscious [sic] would not allow you to answer all three questions yes, even though you thought and were convinced that the evidence showed that the answer should be yes.

Do you see what I am talking about?

* * *

(VD 360, 361).

Jenson first agreed he could follow the law (VD 361), then vacillated (VD 362; A. 10), then optimistically stated that surely if he "personally thought" the defendant "ought to be saved" then "there's bound to one of three [questions] I wouldn't agree with so I would have to vote no on one of them," (*id.*).

Ultimately, Jenson confirmed that his answers to the questions would be affected in the manner described by his knowledge of the consequences of the answers. (VD 368-69; A. 13). He was excused for cause for that reason.

Mr. George C. Ferguson (VD 613; A. 14)

Ferguson had been opposed to capital punishment for most of his life. (VD 614-15; A. 14). Initially he stated that it would be "almost impossible" to vote for the death penalty (VD 615; A. 15) and that he didn't "believe" he could do it (VD 616; A. 15); he next admitted that he would have to automatically vote against the death penalty (*id.*). Notably, the prosecutor did *not* ask that the juror be excluded on *Witherspoon* grounds. Instead, the prosecutor in the manner described above went on to explain that in Texas, jurors do not vote for death, but answer fact questions. (VD 616-20; A. 15-17). Ferguson then admitted that he could not take the statutory oath. (VD 621; A. 18). The trial judge further explained the law and questioned the juror (VD 622-26; A. 18-19), learning that Ferguson could make no moral distinction

between answering fact questions with an automatic result and voting directly for that result:

> "Well, if you were putting me in a situation where I knew it was -- saw it was a yes answer to those three questions that, in effect, I would be doing the same thing as sending him to the electric chair." (VD 624-25; A. 19).

The prosecutor then asked to exclude the juror both upon the basis of *Witherspoon* and §12.31(b). (VD 625; A. 19). The trial judge's additional questions indicate that the juror was excluded on the latter ground. (VD 626, 629; A. 19).

Ms. Nelda Coyle (VD 1017; A. 19)

Ms. Coyle favored the death penalty "in certain circumstances. . .[e]ver since I can remember." (VD 1023; A. 20). The prosecutor explained the Texas sentencing procedure to her. (VD 1028-30). She admitted that she could not take the statutory oath to truthfully answer the fact questions (VD 1030-31; A. 20), but the careful trial judge refused to exclude her unless he were sure she understood the *meaning* of the oath. (VD 1031). Defense counsel attempted to explain the problem:

> "Now, do you follow me? Your factual determination of guilt or innocence -- in other words, you might not answer the questions, the three questions honestly because you want to save him or because on the other hand you might feel that the facts in your opinion justify a more severe punishment than the actual facts would set forth."

(VD 1044).

The trial judge then accurately explained Texas law to her himself. (VD 1046-55; A. 20-24). The trial judge explained at great length and in great detail that to

swear that she would not be "affected" by the possible punishment meant that she would truthfully answer the fact questions, regardless of the consequences of her answers:

THE COURT: You see, it would not be fair, to the Defendant for instance --

JUROR COYLE: I understand.

THE COURT: You see, to have a juror that might gauge a certain answer to get a certain result on punishment would not be fair.

JUROR COYLE: I understand.

THE COURT: And the same to the State. So that is why we have to have this assurance from the juror that there is no question in your mind but what you could follow the law and not be affected in you deliberations by the punishment.

(VD 1052-53; A. 23).

Ultimately, after giving contradictory answers (*e.g.*, VD 1060), Ms. Coyle was excluded for cause because she could not take the statutory oath. (VD 1070).

Mrs. Lloyd White (VD 1525; A. 25)

Mrs. White gave several contradictory responses as to her feelings about capital punishment, but ultimately succinctly stated her opinion as follows: "I think I believe in capital punishment but I don't want to have anything to do with it, is that clear?" (VD 1530; A. 26). The prosecutor further inquired as follows:

Q: [By Mr. Tokley] All right. You believe in capital punishment but you personally could never sit

in a case which would call upon you to make decisions that could lead to a man's death?

A: [By Mrs. White] Uh-huh.

Q: That is your feeling?

A: Yes.

(VD 1530-31; A. 26-27). No *Witherspoon* objection, however, was offered. Instead, both the prosecutor (VD 531-38; A. 27) and then the trial judge explained the Texas sentencing procedures to Mrs. White:

THE COURT: Now, if you answer all three of those questions yes then he gets the death penalty. If you answer any of those questions no then he gets life imprisonment. So you don't directly vote life or death but you indirectly vote life or death depending on your answers to those questions

Do you follow me?

JUROR WHITE: Yes, I think I do.

THE COURT: In other words, during the whole trial nobody is ever going to ask you should he get life or should he get death if he is convicted. If he is found guilty of capital murder all that is going to happen in the punishment hearing is you are going to be asked as the jury to answer the three questions and your answers to those questions will then decide legally whether he receives the death penalty or life imprisonment.

Now, the law says that a person who is on a jury, when they are given

those three questions, if he is convicted of capital murder then go back and deliberate your verdict on those three questions. Now, a juror to be qualified to serve on a case has got to be in a position where they can truthfully and objectively listen to the evidence and answer those questions the way the juror thinks the questions ought to be answered. Okay?

JUROR WHITE: Uh-huh.

THE COURT: You cannot go back in the jury room and say, well, I want him to get life imprisonment so I am going to answer the questions no. You have got to answer the questions the way the evidence tells you it ought to be answered without any regard to what punishment would result.

(VD 1539-42).

The juror was unable to take an oath that her deliberation would not be affected in the manner described. (VD 1545; A. 28). She briefly changed her mind and stated that she "guess[ed]" she could answer the fact questions truthfully (VD 1547; A. 28), but then unequivocally reasserted her inability to take the oath:

MS. JAMES: Your Honor, I again object to this question, it's been asked and answered on the first go-around. I think they finally did answer the first time they went around. She did not think her fact deliverations would be unequivocally --

JUROR WHITE: Well, I don't think -- I think that was wrong.

THE COURT: Your objection is overruled.

JUROR WHITE: I think I answered wrong. I think I have got to go back the other way now.

THE COURT: Well, that is what we are trying to find out.

JUROR WHITE: Now, am I making myself clear now?

* * *

(VD 1558-59, *see* 1562-63; A. 29, *see* 29-30).

Thus, Mrs. White was excused for cause for inability to take the statutory oath. (VD 1563; A. 30).

Mr. Curtis Williams (VD 2571; A. 30).

Mr. Williams was the most vacillating of all the challenged jurors. Initially he was unable to say whether he favored capital punishment:

Q: [By the prosecutor] Okay. Can you tell us how you feel?

A: [By Williams] I think a person should be punished if they have done wrong.

Q: What about capital punishment, the ultimate punishment?

A: First, killing another person, killing someone, I don't know about that. I don't know.

Q: Let me ask you this: Are your feelings such that you don't really know how you feel about it?

A: I just don't know how I feel.

(VD 2576; A. 30).

He stated several times that he didn't think or believe that he could vote for the death penalty and that he felt that way "pretty strongly," (VD 2587; A. 31). At one point he finally stated that he could not vote to impose the death penalty:

A: [By the witness] Well, like I've told you, if a guy that killed somebody -- I can see him receiving a sentence or something like that, but I don't think I could just -- depending on me to say, "Kill this guy," I don't think I could do that.

Q: [By the prosecutor] When you say "I don't think" are you saying you couldn't do it?

A: I can't do it.

Q: All right. I think we've finally broken the ice.

(VD 2591-92; A. 32-33). Williams retreated to his ambivalence, however. (VD 2595-98; A. 33-34).

Because of his uncertainty, Williams admitted that he didn't know if he could follow the law and answer the fact questions truthfully. (VD 2595, 2597-98, 2602-03; A. 33-35). He was successfully challenged for cause by the prosecution for that reason. (VD 2604).

Mrs. Bobbie Andrews (VD 2692; A. 35)

Mrs. Andrews stated that she was in favor of the death penalty, but like Mrs. White before her, she absolutely under no circumstances could participate in imposing the death penalty personally. (VD 2697; A. 35). The prosecutor then offered to exclude her on the apparent basis of *Witherspoon*, but the trial court instructed him to inquire under §12.31(b). (VD 2697-98; A. 35). The Texas procedures were then explained to her by both the

prosecutor (VD 2698-2700) and the trial judge. (VD 2701-06; A. 35-36). The trial judge also delineated the meaning of the statutory oath:

> To give you a brief example, a Juror might be back in the jury room and may very well feel the answer to each of those three questions should be yes but over here in the back of his mind hovers the fact that "Well, if I vote yes, he is going to die in the electric chair." A juror may very well feel "I should answer a question no under the evidence, because the true answer is no," but he may feel the crime is so bad the Defendant should die in the electric chair and would be influenced to vote yes instead of no.
>
> The question Mr. Scott is putting is, if you were on the Jury, could you answer all of the questions you're asked in the Court's charge, answer all those based solely on evidence you hear? Or, on the other hand, would the punishment of death or life affect your deliberations on these different issues. If that would affect your deliberations on these different issues, you're not qualified. If it would not affect your deliberations, you're qualified. It's that simple -- it's not simple, but that's the way I'm trying to explain.
>
> We come back to statutory Article 1231 [sic]; if you are on this Jury could you give us your unequivocal assurance that the punishment of life or death would not affect your deliberations on any fact issues in this case?
>
> THE WITNESS: I don't believe I could give you my unequivocal assurance.
>
> * * *
>
> THE COURT: It would not be right to the Defendant, for instance, if a Juror felt, after hearing all the evidence,

"By golly, he ought to die in the electric chair" and went back there and answered those questions yes to see to it by the answers that he got death. Do you see what I mean?

THE WITNESS: Uh-huh.

THE COURT: Those questions are not geared to letting the Jury manipulate the answers. The answers have to be honest. Nobody has any quarrel with the way you feel. If you will be affected, not be affected, or you don't know. It's that simple.

So let me give you the question one more time. Would the mandatory punishment of death or life affect your deliberations on any fact issue in this case?

THE WITNESS: (Pause.) I have to say it would.

(VD 2703-06; A. 35-36)

Defense counsel's attempt to rehabilitate the juror focused on *Witherspoon*, not §12.31(b). Mrs. Andrews reiterated that she favored the death penalty in extreme cases (VD 2708; A. 36), but in "no situation," as defense counsel phrased it, could she "set aside your own feelings and feel the right of the State to administer punishment prevailed over your own individual feelings," (VD 2709). She repeatedly and consistently adhered to this position (VD 2719-20; 2726-27; A. 37, 38), emphasizing that as a result her fact deliberations would be affected in the manner described (*id.*).

Because the witness could not take the required oath to answer honestly, she was excused for cause. (VD 2727; A. 38).

Mr. Anthony Giuffrida (VD 4443; A. 38)

Mr. Giuffrida, like Mrs. White and Mrs. Andrews, favored the death penalty, "but to actually put my hand to it, I don't think I could. I don't think I could." (VD 4448; A. 38). He repeatedly stated that he very much doubted whether he could vote to impose the death penalty, and enthusiastically agreed that his answers to the fact questions might be affected by this reluctance. Both the prosecutor (VD 4450-59; A. 39-41) and defense counsel (VD 4459-61; A. 41) explained Texas law in detail to the venireman, including the aspect that jurors in capital cases answer fact questions with automatic consequences rather than vote for death or life imprisonment (VD 4453-54, 4456-57, 4461; A. 40, 41). He was unable to make any moral distinction between voting for death and answering fact questions resulting in death. (VD 4456; A. 40). Thus, he was excused for cause. (VD 4258-59, 4464; A. 41).

Penny L. McDonald (VD 4492; A. 42)

Ms. McDonald was opposed to capital punishment. (VD 4496; A. 42). She stated, however, that she might be able to impose the death penalty in a proper case. (VD 4506; A. 43).

The punishment phase of trial was then explained to the juror. (VD 4522-29). The prosecutor particularly explained that under the Texas statutory scheme, jurors no longer have unbridled discretion upon punishment, but instead are closely guided in their deliberations by the fact questions:

> Some jurors tell us that unless I have the discretion to either decide whether he got death or life and simply was I able to write out that word death or life, I cannot. My conscience will not allow me to lose that discretion and, therefore, I can't sit on this jury because the

way the law is presently set up does not give me any discretion at all. It requires me to answer those questions yes or no, and it requires me to honestly answer those three questions -- and some jurors say I can easily see where it might well be answering those three questions yes, meaning he is going to die, and I personally feel to my sense of justice, for some reason, either because of his part that he played, either because of some mental illness, that I detect from the evidence or for any number of reasons; but because my sense of justice tells me that this man should not die, and I cannot allow him to die at my hand -- sign the verdict form, and yet if I'm put upon that jury, I can see how I could be faced with the possibility of answering all three questions yes. So I can't serve because the law has taken away that discretion from me, to grant my feelings about what he really ought to get, as opposed to what he is going to get.

* * *

(VD 4524-25). The prosecutor explicitly stated:

> The problem comes when a juror or individual on the jury comes into conflict between what he thinks a man ought to get and what he is going to get by the answers of those questions.

(VD 4524).

Initially Ms. McDonald stated that her duties as a juror to answer the fact questions truthfully posed no dilemma (VD 4525), but she quickly admitted that in fact she would have difficulty answering the questions solely on the basis of the evidence. (VD 4527-40; A. 43).

Next the trial court explained the matter in very similar terms:

THE COURT: The whole trial is one whole fact finding process. The first fact that you have got to find is whether or not he is guilty or not guilty.

If you find him guilty, you then as a jury, go into a fact finding process of whether or not he fits in that category. Now, since it is solely a fact finding process, your duty is to find the facts and to not replace what the legislature -- in other words, the legislature says that if a person fits these three facts, he dies. It's not right for a jury to go back and say -- gee, I know they proved it beyond a reasonable doubt. I know I should answer yes to all of the questions, but I personally think he ought not to get death in this case, so I'm going to answer -- I'm not going to answer the three questions yes. I'm going to answer one no to keep him from getting death.

MS. MCDONALD: I get the impression that if we find the Defendant guilty and get back there and have three questions, it's only natural each one is going to answer all yes. How else are you going to answer that because all these questions about the death penalty and how I feel about it.

THE COURT: You see, what the law contemplates is that when you're on the jury and when you are deliberating on those three questions, if you find him guilty -- you never get those questions until you find him guilty. When you deliberate on those three

questions, that you will put out of your mind anything about death or life, that you will answer those three questions based upon the evidence that you heard during the trial without any regard to what the punishment might be.

Now, the law says that you're not qualified to be on this jury unless you can assure us that you will answer those three questions and any other fact questions in this case without any regard to the punishment, because if you let that punishment influence your finding of those questions, then you have circumvented what the legislature said.

The legislature said that all you do is to find facts and your findings must be based solely on the evidence that you heard during the trial, and you don't distort or twist your answers to those facts based upon what you think the punishment should or should not be. Do you follow me?

(VD 4532-34).

The trial judge explained that the oath required a venireman to affirm that he would be truthful and unbiased as to all questions of fact at both the guilt or innocence and punishment stages of trial:

It's the same on the guilt or innocence part. Let's say the State proved this Defendant's guilt beyond a reasonable doubt, of capital murder.

And you are back there deliberating and you say to yourself -- he is guilty. He is guilty as sin, and I know he is guilty, and they have proved it way beyond a reasonable doubt, but if I find him guilty, and he is going to get life or death, and I don't think he deserves that much punishment, if you get influenced, you see, in your finding of guilt or innocence based upon the punishment, on what the punishment could result in, then you, in effect, have defeated the intent of the legislature and you're not doing your duty.

All Mr. Scott is asking you is would you be able as a juror to answer all of these questions on the guilt or innocence without any regard to the punishment that would result?

(VD 4534-35).

Again Ms. McDonald initially stated she could base her punishment answers solely upon the evidence (VD 4534; A. 43-44), and again she quickly vacillated and gave contradictory responses (VD 4536-43; A. 44).

In the end, she could not take the oath to be unaffected in the manner described (VD 4550-51, 4555-57; A. 44-45, A. 46-47). Again it was explained to her that she was required to answer truthfully the fact questions in spite of her feelings about capital punishment. (VD 4558-59). She stated that she could not take such as oath "and be honest about it." (VD 4559, 4563, 4567-68; A. 47-49). She was excluded for that reason (VD 4568, 4571).

Mrs. Dorothy G. Riddle (VD 4920; A. 49).

Mrs. Riddle was in favor of the death penalty and initially stated that she believed she could vote to impose it in a proper case. (VD 4922, 4925; A. 49, 50). After further questioning, however, she agreed that she could

not, as the prosecutor said, "personally make decisions that would result in this man's death," (VD 4928-29; A. 50), thus aligning herself with Mrs. White, Mrs. Andrews, and Mr. Giuffrida.

The prosecutor did not move to exclude her, but instead stated, "All right. Let me go over -- I have got to go further with you about that." (VD 4929). He explained the Texas sentencing scheme in capital cases (VD 4929-33). The meaning of the statutory oath was clearly stated:

> Can you see the problem there where you -- the evidence points to three yes answers, which if you answer them yes are equivalent to the death penalty; but on the other hand, your own personal feelings are such, based upon something you heard in the case that he should not receive the death penalty.
>
> Okay. In talking to folks there are a number of folks who just could not set their personal feelings aside knowing that answering those three questions is going to result in a man's death. They could not do it. It would violate their conscience, and it would bother them to a point they simply could not answer all three of those questions yes even though the evidence called for yes answers. Or to put it another way, the mandatory sentence of death or life involved in the case would affect their deliberations on these issues of fact in the case.

(VD 4932-33).

At first Mrs. Riddle stated that she could answer the fact questions truthfully on the basis of the evidence (VD 4933-35; A. 50-51). Ultimately, however, she admitted that she could not:

Q: [By the prosecutor] So you are saying then that if you were selected on this jury and if you were convinced that the Defendant was guilty and if you were convinced that the evidence indicated that the proper answer to the three questions was yes that you could answer all three questions yes knowing full well that it would result in this man's death. Can you tell us that?

A: [By Mrs. Riddle] Yes, until you said it that way.

Q: That's the way it is. We are not talking about in the abstract. We are not talking about some philosophical situation.

A: I know it.

Q: We are talking about a real life case and real life decisions that could, if the facts and circumstances called for it, result in a real person's death. And don't feel like -- don't feel like you have to prove something to yourself or to us by saying I can do it.

A: Yeah.

Q: If you honestly feel like you can't do it, then you are a much better citizen for telling us than leading yourself and leading us to think that you can and then having these horrible doubts that linger all the way through the trial.

* * *

A: I will say no just like the first time.

* * *

(VD 4935-36; A. 51-52). She added that now she was sure about her answer (VD 4937; A. 52).

Defense counsel next carefully explained to Mrs.

Riddle that the meaning of the oath was not that the juror was "forbidden to have feelings," (VD 4943) or to be "a machine without feelings," (VD 4942) but that she must simply swear that "you can set aside your feelings such that you can just look at the question and answer it straight without reading something else into it -- well, I'm afraid of the death penalty or I want this guy to get death, as some people would," (VD 4942).

Ultimately, Mrs. Riddle was excused for cause because she could not so swear as required by §12.31(b). (VD 4943, 4947).

SUMMARY OF ARGUMENT

It could be argued that the doctrine of *Witherspoon v. Illinois*, 391 U.S. 510 (1968) should not apply at all to the sentencing procedures employed by Texas in capital cases. *Witherspoon* and its progeny were decided in an era of unguided and standardless jury sentencing in death cases. In order that the conscience of the community might fairly be reflected in such cases, it was necessary that jurors not be excluded upon the basis of their opposition to the death penalty unless it were also established that their opposition were such that they would automatically and invariably vote against the death penalty, or that their deliberations upon any question of fact would be affected by their feelings about the death penalty. At that time, juries in capital cases typically answered fact questions only upon guilt or innocence, not punishment.

In Texas, however, juries at the sentencing stage of the bifurcated trial are given specific guidelines as to the imposition of the death penalty, although it is true that a wide range of evidence is admissible insofar as aggravating and mitigating circumstances are concerned. Under a Texas statute, Tex. Penal Code Ann. §12.31(b) (Vernon), prospective jurors are informed

during the voir dire examination that they need never vote either for or against the death penalty at the sentencing stage of trial; under Texas law, they only answer the questions of fact set forth in Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon). It is the law that attaches the automatic consequence of death or life imprisonment according to their answers. Under such a statutory scheme, it is possible that some jurors who might be unalterably opposed to the imposition of the death penalty might nevertheless be morally capable of truthfully answering fact questions in accordance with the evidence. A strong case could be made that these jurors are qualified for service because they, too, represent the community conscience.

Historically, however, and in light of Texas case law, this conclusion seems insupportable. First, a Texas statute has been construed as independently supporting the *Witherspoon* doctrine as a ground for exclusion of jurors in capital cases. Prospective jurors were thusly excluded in Texas prior to *Witherspoon*. Second, the Texas Court of Criminal Appeals has frequently applied *Witherspoon* in death penalty cases.

Nevertheless, it is apparent that the pre-*Furman* case of *Witherspoon* is particularly inappropriate fopr the post-*Furman*, *Jurek*-era sentencing procedures in Texas death cases. Section 12.31(b) provides a more meaningful vehicle to assure unbiased juries in capital cases. That statute is not a broader basis of excluding jurors against the death penalty than that allowed in *Witherspoon*. Instead, it is a statute wholly neutral with respect to veniremen's attitudes about the death penalty. This is true both in theory and in fact.

Study of the voir dire examination in the instant case reflects that most of the jurors excluded upon the basis of which Petitioner complains were actually in favor of the death penalty. Their attitudes toward the death

penalty ran the gamut from strong approval to unalterable opposition. The significant characteristic common to all of them was their professed inability to take an oath that their deliberations upon any question of fact, whether at the guilt-innocence or punishment stage of the bifurcated trial, would not be "affected" by their knowledge of the necessary consequences of their answers to the questions.

The trial judge, prosecutor and occasionally defense counsel carefully explained to the veniremen the dual meaning of the oath. First, each prospective juror must swear that at both the guilt or innocence and punishment stages of trial, he will be guided in his deliberations upon questions of fact by the factors enumerated in the law and that he will base his answers solely upon the evidence. Second, and as a consequence, the oath requires him in effect to swear that he will not lie at either stage of trial and dishonestly answer fact questions in order to achieve an abstractly desired result of life imprisonment or death. At Petitioner's trial, if a prospective juror could not thusly vow to follow the law as promulgated by the Texas Legislature and approved by this Court, then the juror was properly excluded.

Another extraordinary aspect of the voir dire examination at Petitioner's trial illustrates why §12.31(b) properly applied not only does not violate *Witherspoon*; it achieves the *Witherspoon* goal of a fair jury more effectively than *Witherspoon* alone ever could in Texas. When a venireman appeared to be disqualified under *Witherspoon*, the prosecutor commonly did not seek exclusion, but instead, sometimes at the suggestion of the trial judge, went on to explain that a Texas juror in a capital case never actually votes for death or life imprisonment, but only answers fact questions with known automatic results. *Then* the prosecutor asked whether the venireman's opposition to the death penalty

would preclude unbiased deliberations. If the venireman continued to insist that he could not answer the fact questions fairly or honestly, only then did the prosecutor move to exclude him.

Thus, §12.31(b) was not generally used as a means of excluding jurors opposed to the death penalty less than to the extent necessary to support *Witherspoon* exclusion. On the contrary, it is more accurate to say that §12.31(b) was used as a means of *rehabilitating* those veniremen who in light of the unique sentencing procedures in Texas might otherwise have been excluded under *Witherspoon*. In this sense, it may be said that *Witherspoon* is an inappropriate means of safeguarding the capital defendant's rights in Texas; §12.31(b) more meaningfully assures a fair jury. Petitioner should not be heard to complain of the statute's application at his trial.

This Court's recent decision in *Lockett v. Ohio*, 438 U.S. 586 (1978), strongly supports the application of §12.31(b) at Petitioner's trial. *Lockett* emphasized that nothing in *Witherspoon* or any other case mandates that the prosecution must accept for jury service jurors who will be biased upon issues of fact. In *Lockett*, the issues of fact were those necessary to decision in the guilt or innocence stage of trial because under Ohio law, that was the only stage in which the jury participated. But in a state like Texas, where fact questions and a jury are involved at the punishment stage of the trial, the reasoning of *Lockett* should be fully applicable. Neither justice nor the defendant's rights can possibly be served by seating biased jurors at the punishment phase of a Texas trial, anymore than those interests would have been served by seating biased jurors at the guilt stage of *Lockett's* Ohio trial.

ARGUMENT

I. THE DOCTRINE OF *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968), APPLIES TO THE BIFURCATED PROCEDURE EMPLOYED BY TEXAS IN CAPITAL CASES.

In light of *Witherspoon v. Illinois*, 391 U.S. 510 (1968), and its most notable progeny, *Boulden v. Holman*, 394 U.S. 478 (1969), *Maxwell v. Bishop*, 398 U.S. 262 (1970), and *Davis v. Georgia*, 429 U.S. 122 (1976), there is a sound argument that the *Witherspoon* doctrine is peculiarly inapplicable to the Texas capital punishment sentencing scheme embodied in Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon) and Tex. Penal Code Ann. §12.31 (Vernon). That is, the general inappropriateness of the *Witherspoon* doctrine to some types of "guided discretion" sentencing schemes enacted in the wake of *Furman v. Georgia*, 408 U.S. 238 (1972) is particularly well illustrated by examination of the Texas scheme analyzed and upheld in *Jurek v. Texas*, 428 U.S. 262 (1976). Yet the conclusion that *Witherspoon* is inapplicable to Texas capital punishment procedures seems insupportable in light of the Texas experience and case law.

A. Logically, the *Witherspoon* Doctrine May Be Inapplicable to the Bifurcated Procedure Employed by Texas in Capital Cases.

At the time *Witherspoon v. Illinois*, 391 U.S. 510 (1968), was decided, most death penalty statutes were of the unguided discretion type approved in *McGautha v. California*, 402 U.S. 183 (1971). In that case, McGautha argued "that the absence of standards to guide the jury's discretion on the punishment issue is constitutionally intolerable" and "fundamentally lawless," 402 U.S. at 196.
The Court concluded otherwise:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

402 U.S. at 207.

It is reasonable to infer from the Court's discussion that a saving basis of the California and Ohio statutes was the holding in *Witherspoon v. Illinois*, which protected capital defendants from the worse excesses of standardless jury sentencing. Illinois law had allowed prospective jurors with conscientious scruples against the death penalty to be challenged for cause by the prosecution. The expressed rationale for this basis of challenge was that a juror with religious or conscientious scruples against capital punishment "might hesitate to return a verdict inflicting such punishment," *People v. Carpenter*, 150 N.E.2d 100, 103 (Ill. 1958), *quoted in Witherspoon v. Illinois*, 391 U.S. at 513 n. 2. Upon that basis nearly half of the entire jury panel — forty-seven of ninety-five veniremen — was excluded for cause. It would be difficult to maintain persuasively that the resultant jury panel would not have been more likely than a more inclusive sample of the population to impose the death penalty, although one certainly might with the dissenters — Justices Black, Harlan, and White — question the majority's characterization of the resultant jury as "a jury uncommonly willing to condemn a man to die," 391 U.S. at 521, a "hanging jury," 391 U.S. at 523, or a jury amounting to a "stacked deck," *id.*

Significantly, in the famous footnote 21, the Court noted among other things that nothing precludes a state from excluding veniremen whose "attitude toward the death penalty would prevent them from making an im-

partial decision as to the defendant's *guilt*," 391 U.S. at 522 n. 21 (emphasis in original). It is submitted that this statement embodies the wholly obvious proposition that neither the defendant nor the prosecution is powerless to exclude for cause any juror who cannot be unbiased or unprejudiced with respect to any issue of fact.

In the pre-*Furman* era, such issues of fact were encountered only at the guilt or innocence stage of trial. As a result of *Furman v. Georgia*, that is no longer true. As discussed in *Jurek v. Texas*, 428 U.S. 262 (1976), Texas employs a bifurcated criminal trial procedure in capital as well as other cases. Tex. Code Crim. Proc. Ann. arts. 37.07, 37.071 (Vernon). In a capital context the jury must first find at the guilt or innocence stage of trial that the defendant has committed murder as defines in Tex. Penal Code Ann. §19.02 (Vernon), and further that he has committed it under one of the five aggravating circumstances enumerated in §19.03: *i.e.*, that he murdered a peace officer or fireman; that he murdered in the course of kidnapping, burglary, robbery, aggravated rape, or arson; that he murdered for remuneration; that he murdered while escaping from custody; or that he murdered a prison or jail guard. *See Jurek v. Texas*, 428 U.S. at 268.

If the defendant is found guilty of capital murder, then the same jury conducts a punishment hearing. At that hearing, the jurors do not directly vote for a sentence of either death or life imprisonment, although they were informed during the voir dire examination "that a sentence of life imprisonment or death is mandatory on conviction of a capital felony." Tex. Penal Code Ann. §12.31(b) (Vernon). Instead, the jury is required to answer three fact questions:

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) If raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Tex. Code Crim. Proc. Ann. art. 37.071(b) (Vernon). If the jury affirmatively answers all three questions, then the trial judge automatically assesses punishment at death. If at least ten of the twelve jurors agree that the answer to at least one of the questions is "no," then the sentence of life imprisonment automatically results. Arts. 37.071(c), (d), and (e). *See Jurek v. Texas*, 428 U.S. at 269.

The entire Texas scheme was upheld essentially for two reasons. First, the jury is carefully guided in its sentencing discretion by the terms of the Texas statutes. Thus, the arbitrary and capricious imposition of the death penalty condemned in *Furman v. Georgia* was avoided. Second, the Texas Court of Criminal Appeals held that an extremely wide range of mitigating evidence was admissible at the punishment phase of trial so that the convicted defendant might have the opportunity to show why the death penalty should not be imposed. *Jurek v. State*, 522 S.W.2d 934 (Tex.Crim. App. 1975), *aff'd*, 428 U.S. 262 (1976); *Smith v. State*, 540 S.W.2d 693 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 922 (1977).

Thus, the sentencing scheme in Texas capital cases is constitutional because the jury answers fact questions that are sufficiently broad and inclusive insofar as relevant mitigating factors are concerned that the jury is required to act as the conscience of the community. A distinctively crucial feature of the entire scheme is that the jury itself *does not vote to impose any penalty*.[2] Under Tex. Penal Code Ann. §12.31(b) (Vernon):

> Prospective jurors shall be informed that a sentence of life imprisonment or death is mandatory on conviction of capital felony. A prospective juror shall be disqualified from serving as a juror unless he states under oath that the mandatory penalty of death or imprisonment for life will not affect his deliberations on any issue of fact.

Hence, although jurors know the necessary effect of their answers to the fact questions, the jurors themselves never vote for death or life imprisonment. It is the law that attaches either consequence to the answers to the fact questions.

Logically, it would seem that a juror's abstract feelings about capital punishment, regardless of the depth of his convictions, is an insufficient basis for exclusion from jury service. That is, under *Witherspoon* a juror who states that he is unalterably opposed to the death penalty in such a manner that he would automatically vote against it in every case regardless of the circumstances and in no case could he ever consider imposing such a penalty, is excludable for cause.

But in Texas it is arguable that such a juror should not necessarily be disqualified. The examination should continue and the Texas scheme should be carefully ex-

[2]Cf. the Georgia statute discussed in *Davis v. Georgia*, 429 U.S. 122 (1979), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *See*note 9, *infra*.

plained to the juror so that he understands that he does not actually vote for the death penalty. Instead, he merely answers such questions as whether there is a probability that the convicted defendant will continue to commit future acts of violence against society.

It is not unlikely that there is a discrete group of jurors who might be unable morally, ethically, religiously, or philosophically to directly send a human being to his death by virtue of signing or voting for a death verdict, but nevertheless be able to take an oath to honestly and fairly answer questions of a factual nature about the convicted defendant. Such a hypothetical juror might well rationalize the apparent inconsistency in his position by espousing the not wholly unreasonable view that in spite of his "unalterable" opposition to the death penalty, by doing his duty as a citizen and truthfully answering fact questions about a defendant, it is not he who condemns the accused to die, but the law. It is not he who decides that the convicted murderer is to be executed; he has merely decided that as a factual matter, the murderer has killed deliberately, in an unreasonable response to provocation, and that he will continue to commit future acts of violence against society. Such a juror might consistently answer the fact questions honestly and at the same time express moral outrage at the consequence the law has necessarily attached to his answer to those fact questions.[3]

The same ethical dilemma might be resolved in like manner for the biblically oriented juror posited by Mr. Justice Black dissenting in *Witherspoon*, 391 U.S. at 536. This juror adheres literally to the admonition of

[3]It is worth remembering that, "The critical question, of course, is not how the phrases employed in this area have been construed by courts or commentators. What matters is how they might be understood — or misunderstood — by prospective jurors." *Witherspoon*, 391 U.S. at 515 n.9.

"an eye for an eye" and is conscientiously or religiously opposed to *not* inflicting the death sentence on any person convicted of capital murder. Yet it is possible that this juror, even though he could never affirmatively vote for life imprisonment or any other sentence except death for a convicted murdered, might nevertheless truthfully answer that he did not believe that the murderer would commit future acts of violence against society. Again, such a juror in his own moral scheme may be blameless if it is the law that attaches an inappropriate or even abhorred consequence to his truthful answer.

Just as *Witherspoon* may exclude some veniremen who perhaps should be qualified to serve on a Texas jury in a capital case, so also it is ineffective to weed out some jurors with attitudes toward the death penalty quite inimical to a fair trial. A less dramatic but perhaps more common example than those set forth above may serve to illustrate this fact.

Many jurors, wholly apart from their attitude toward the death penalty, are unable or unwilling to subjugate their own desires and allow their discretion in sentencing to be guided in the manner prescribed by Texas law. They believe that they should have free rein to impose death or life imprisonment as they see fit and that the statutory questions designed to guide their exercise of discretion are merely obstacles in this process.

Such veniremen, some of whom appeared at Petitioner's trial, were qualified to serve on a pre-*Furman* jury and *Witherspoon* did nothing to exclude them. Now that such veniremen are not qualified to serve to the extent that they will be biased in their deliberations of fact, *Witherspoon* still does not operate to exclude them.[4]

[4]Only Tex. Penal Code Ann. §12.31(b) (Vernon), and possibly Tex. Code Crim. Proc. Ann. art. 35.16 (b)(3), (c)(2) (Vernon), accomplish this result.

Thus, as a logical matter, in Texas perhaps no juror should be excluded merely because he is either unalterably opposed or invariably in favor of the death penalty as a punishment for capital murder. Instead, any such juror should be qualified to sit on a Texas jury if he can state under oath that his deliberations on any matter of fact, whether at the guilt-innocence or punishment stage of trial, will not be affected in the manner described by his knowledge of the consequences that the law attaches to the outcome of those deliberations. As forceful as this conclusion may seem, it is insupportable in light of the Texas experience and case law.

B. The Texas Experience and Case Law Do Not Support the Conclusion that the *Witherspoon* Doctrine Is Inapplicable to the Texas Bifurcated Procedure in Capital Cases.

After *Witherspoon v. Illinois*, 391 U.S. 510 (1968) was decided, the first Texas case to grapple with its application to Texas procedure was *Pittman v. State*, 434 S.W.2d 352 (Tex.Crim.App. 1968). In this notable opinion, presiding Judge Onion ably and exhaustively reviewed the relevant Texas history and practice with respect to veniremen with conscientious scruples against the death penalty. He concluded, "The impact of *Witherspoon* upon Texas in the selection of jurors in capital cases where the state is seeking the death penalty will not, while undoubtedly sharpening the traditional practice, so much affect that practice as it will the necessity for preserving for appellate review the manner of that selection." *Pittman v. State*, 434 S.W.2d at 357. In effect, Judge Onion held that *Witherspoon* would exert only minimal change in the ordinary Texas procedures. His reasoning follows.

At the time *Witherspoon* was decided, the prosecution could challenge a venireman for cause if he had "conscientious scruples in regard to the infliction of the punishment of death for crime, in a capital case, where

the State is seeking the death penalty." Tex. Code Crim. Proc. Ann. art. 35.16(b)(1) (Vernon). In truth, this basis of challenge for cause had been available to either side virtually from the earliest days of the Republic and before there was a comprehensive criminal code in Texas. *E.g.*, *White v. State*, 16 Tex. 206 (Tex. 1856); *Burrell v. State*, 18 Tex. 713 (Tex. 1857). Later the substantially identical rule was statutorily embodied within the comprehensive criminal codes including, for example, Tex. Ann. Code Crim. Proc. (1925) art. 616(11), which provided that a venireman could be challenged for cause if he "has conscientious scruples in regard to the infliction of the punishment of death for crime."

The most significant change in the 1965 Code revisions was that a challenge for conscientious scruples was made available only to the prosecution, not the defendant. Judge Morrison has explained, "It was the thought of the Committee that no accused could conceivably be injured by having to take such a juror and so such challenge by the accused was deleted from the revision." Morrison, "Interpretive Commentary," *following* Tex. Code Crim. Proc. Ann. art. 35.16 (Vernon).[5]

In spite of the language of the statute, which appears to authorize exclusion upon the basis and for the reasons condemned in *Witherspoon*, Judge Onion noted in *Pittman* that it had "long been the traditional practice in Texas, before and after the effective day of the 1965

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[5]It is also worth noting that a challenge for "bias or prejudice against any phase of law upon which the State is entitled to rely for conviction or punishment," Tex. Code Crim. Proc. Ann. art. 3516 (b)(3) (Vernon), or for "a bias or prejudice against any of the law applicable to the case upon which the defense is entitled to rely, either as a defense to some phase of the offense for which the defendant is being prosecuted or as a mitigation thereof or of the punishment therefor," art. 35.16(c)(2), is available to the prosecution and the defense equally.

Code, not to excuse a juror in capital cases who simply stated that he had conscientious scruples against the death penalty but to interrogate such a juror further to determine if this means he or she could never vote for the death penalty." *Pittman v. State*, 434 S.W.2d at 356. *See Stout*, "Examination of Prospective Jurors in Capital Cases," 29 Tex. L.Rev. 34 (1950). Several contributing factors to the Texas traditional practice were noted. Finally, the court correctly concluded, "Such practice squares with the requirements of *Witherspoon*." 434 S.W.2d at 356.

Thus, in *Grider v. State*, 468 S.W.2d 393 (Tex.Crim. App. 1971), the Court of Criminal Appeals reversed a conviction because prospective jurors were excused after expressing conscientious scruples against the death penalty, but without stating that they could never vote to consider its imposition. The court noted that such exclusion "does not square with *Witherspoon* or the traditional Texas practice," *Grider v. State*, 468 S.W.2d at 399. Indeed, in light of the Texas statute ultimately condemned in *Branch v. Texas*, the companion case to *Furman v. Georgia*, a capital defendant's need for this kind of protection is understandable.

After promulgation of the new Texas death penalty and punishment statutes, Tex. Penal Code Ann. art. 1257 (Vernon) (eff. June 14, 1973), and §§19.03 and 12.31(b) (Vernon) (eff. Jan. 1, 1974), *Hovila v. State*, 532 S.W.2d 293 (Tex.Crim.App. 1975), presented the Texas court with its first opportunity to consider the exclusion of conscientiously scrupled veniremen in alleged violation of the *Witherspoon* doctrine. Upon the dual basis of the traditional Texas practice and the *Witherspoon* doctrine, the conviction was overturned. The court rejected the state's argument that the new statutory scheme, especially the oath provided for under then art. 12.57(d) and now §12.31(b), rendered inapplicable the *Witherspoon* doctrine, reasoning as follows:

> To say that the jury's answers would not be affected by their attitude toward the death penalty as a punishment for crime simply because they will not bring forth the ultimate verdict would be to disregard the obvious. We will not engage in such tenuous reasoning.
>
> We hold, therefore, that the *Witherspoon* test remains the same.

Hovila v. State, 532 S.W.2d at 294.

Judge Odom in dissent provided the only explicit basis known to Respondent in Texas law for the logical argument set forth in Part I(A) above. Judge Odom noted that under the new statutory scheme "the jury neither imposes nor recommends imposition of the death penalty under the statute." To reverse the conviction in spite of each juror's oath that he could honestly and truly deliberate upon all issues of fact would be to "rel[y] upon a presumption of jury misconduct," 532 S.W.2d at 296.

The *Hovila* opinion was nevertheless not without basis. First, the traditional Texas practice as explained by the court in *Pittman v. State* was surely a point of reference militating in favor of reversal. Second, the court undoubtedly felt a compunction to apply *Witherspoon* as the law of the land that this Court had proclaimed it to be.[6] Third, the less than exhaustive voir dire examination in *Hovila* was probably inadequate under both *Witherspoon* and §12.31(b), making the conviction a difficult one to uphold under either authority.

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[6]As Mr. Chief Justice Burger has written, "The signals from this Court have not, however, always been easy to decipher." *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

Since *Hovila*, the Court of Criminal Appeals has on numerous occasions reaffirmed the applicability of *Witherspoon* to Texas procedure. For example, the court has several times stated that the *Witherspoon* doctrine is "still alive and well" in Texas. *E.g.*, *Woodkins v. State*, 542 S.W.2d 855, 862 (Tex.Crim.App. 1976), *cert. denied*, 436 U.S. 960 (1977); *Burns v. State*, 556 S.W.2d 270, 275 (Tex.Crim.App.), *cert. denied*, 434 U.S. 935 (1977); *Brock v. State*, 556 S.W.2d 309, 312 (Tex. Crim.App.), *cert. denied*, 434 U.S. 1002 (1977); and *Whitmore v. State*, 570 S.W.2d 889, 893 (Tex.Crim.App. 1976) (on original submission).

In these and many other cases, the Court of Criminal Appeals has consistently held that the *Witherspoon* doctrine applies to sentencing procedures in Texas capital cases. *E.g.*, *Moore v. State*, 542 S.W.2d 664, 672 (Tex. Crim.App. 1976), *cert. denied*, 431 U.S. 949 (1977); *Woodkins v. State*; *Burns v. State*; *Shippy v. State*, 556 S.W.2d 246, 251-52 (Tex.Crim.App.), *cert. denied*, 434 U.S. 935 (1977); *Brock v. State*; *Hughes v. State*, 562 S.W.2d 857, 859-61 (Tex.Crim.App.), *cert. denied*, 439 U.S. 903 (1978); *Hughes v. State*, 563 S.W.2d 581, 583 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 950 (1979); *Chambers v. State*, 568 S.W.2d 313, 318-20 (Tex.Crim. App. 1978), *cert. denied*, 440 U.S. 928 (1979); *Bodde v. State*, 568 S.W.2d 344, 348-49 (Tex.Crim.App. 1978), *cert. denied*, 440 U.S. 968 (1979); *Garcia v. State*, 581 S.W.2d 168, 174-75 (Tex.Crim.App.), *petition for cert. filed* (U.S. Oct. 5, 1979) (No. 79-5464); and *Burks v. State*, 583 S.W.2d 389, 393-96 (Tex.Crim.App.), *petition for cert. filed* (U.S. Oct. 22, 1979) (No. 79-5533). *See also Smith v. State*, 540 S.W.2d 693, 697-98 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 922 (1977); *Boulware v. State*, 542 S.W.2d 677, 683 (Tex.Crim.App. 1976), *cert. denied*, 430 U.S. 677 (1977); *Granviel v. State*, 552 S.W.2d 107, 123-24 (Tex.Crim.App. 1976), *cert. denied*, 431 U.S. 933 (1977); *Freeman v. State*, 556 S.W.2d 287, 297-98 (Tex.Crim.App. 1977), *cert. denied*, 434 U.S.

1088 (1978); and *Adams v. State*, 577 S.W.2d 717 (Tex. Crim.App. 1979) (A. 56).

The rule that may be distilled from these emanations of authority from the Court of Criminal Appeals is that *Witherspoon* and §12.31(b) co-exist as separate and independent bases of excluding jurors.[7] The former has been held applicable to Texas sentencing procedures as a result of the traditional Texas practice and, of course, as a result of that court's perceived duty to obey the law of the land as established in this Court's decisions. The latter has been properly justified for the reasons set forth below.

II. THE EXCLUSION OF PROSPECTIVE JURORS IN THIS CASE PURSUANT TO TEX. PENAL CODE ANN. §12.31(b) (VERNON) DID NOT VIOLATE THE DOCTRINE OF *WITHERSPOON V. ILLINOIS*, 391 U.S. 510 (1968).

From the foregoing discussion, one principle ineluctably emerges. Whatever may be said in favor of the moral value of the struggle, to directly apply the doctrine of *Witherspoon* and its progeny to the Texas sentencing procedures in capital cases upheld in *Jurek v. Texas*, 428 U.S. 262 (1976), is to employ a tool less than ideally suited for the task. That is, in light of the guided discretion fact questions that Texas sentencing juries are required to answer in capital cases, excusing prospective jurors upon the basis of their unalterable opposition to the death penalty and their inability to vote for a sentence of death in any case is a clumsy and at best inappropriate means of achieving the goal of a fair jury in a capital case.

[7]One respected Texas commentator has called the Court of Criminal Appeals' holdings in this regard "both fair and workable." Crump, "Capital Murder: The Issues in Texas," 14 Hous. L.Rev. 531, 545 (1977).

In fact, for reasons suggested above and more fully discussed below, Respondent ventures to suggest that *Witherspoon* is an inadequate means of safeguarding the defendant's rights in capital cases in Texas unless such a defendant is afforded the additional benefit of Tex. Penal Code Ann. §12.31(b) (Vernon). The essential reason is that some jurors might be disqualified or subject to exclusion for cause under *Witherspoon*, and yet be rehabilitated under §12.31(b) in that they would be capable of deliberating honestly in the Texas punishment process, their opposition to the death penalty notwithstanding. These jurors generally may well be ones favored by the defense.

Not surprisingly, the Texas Court of Criminal Appeals has been unable to glean any direct support from this Court's teachings for the proposition that the *Witherspoon* doctrine is inapplicable to Texas sentencing procedures in capital cases. Accordingly, that court in cases such as *Hovila v. State*, 532 S.W.2d 293 (tex.Crim.App. 1975), has conscientiously reversed death penalty convictions where it has perceived *Witherspoon* error. At the same time, the court has steadfastly held that regardless of whether a venireman is qualified under the *Witherspoon* doctrine, he is not qualified to sit on a Texas jury in a capital case if he cannot take the oath embodied in Tex. Penal Code Ann. §12.31(b) (Vernon). E.g., *Moore v. State*, 542 S.W.2d 664, 672 (Tex.Crim.App. 1976). *cert. denied*, 431 U.S. 949 (1977); *Brock v. State*, 556 S.W.2d 309, 311-13 (Tex.Crim.App.), *cert. denied*, 434 U.S. 1002 (1977); *Bodde v. State*, 568 S.W.2d 344, 348 (Tex. Crim.App. 1978), *cert. denied*, 440 U.S. 968 (1979): *Whitmore v. State*, 570 S.W.2d 889, 892-93 (1976) (on original submission); *Adams v.State*, 577 S.W.2d 717, 728 (Tex.Crim.App. 1979) (A. 56, 74), and cases there cited.

It is only by fundamentally misunderstanding the proper purposes of §12.31(b), as well as misstating the manner in which the statute was utilized in the instant case, that it may be concluded that the *Witherspoon* doctrine or any other known constitutional principle was violated by the selection procedures at Petitioner's trial. These procedures sought to achieve a fair and unbiased jury by eliminating veniremen who refused or were unable to assure the defense and the prosecution that they would be guided in their deliberations as required by Texas law and the Constitution. These prospective jurors were unable to swear that they could deliberate fairly and honestly at the punishment and in some cases the guilt or innocence stage of Petitioner's trial.

A. Section 12.31(b) Is Not the Broader Basis of Excluding Jurors Against the Death Penalty Condemned in *Witherspoon.*

The entire premise of Petitioner's position seems to be that Tex. Penal Code Ann. §12.31(b) (Vernon) is simply a method conjured up by the Texas Legislature, used by Texas prosecutors, and approved by Texas appellate courts for sweeping from the jury panels all prospective jurors opposed to capital punishment, but who nevertheless are technically qualified for jury service under the *Witherspoon* doctrine. Both historically and practically, nothing could be further from the truth.

1. The origins and specific purposes of the *Witherspoon* doctrine and §12.31(b) are different.

Witherspoon v. Illinois, 391 U.S. 510 (1968), *Boulden v. Holman*, 394 U.S. 478 (1969), and *Maxwell v. Bishop*, 398 U.S. 262 (1970), were all decided in an era of sentencing procedures in capital cases characterized by the type of unguided jury discretion at sentencing that

was upheld in *McGautha v. California*, 402 U.S. 183 (1971), as discussed more fully in part I(A) above. The juries in such cases were, of course, given wide latitude in deciding the fate of capital defendants. One may reasonably surmise that the jury debate about punishment in capital cases under such statutes must have been quite open-ended and far ranging indeed. Under the circumstances, it is understandable that the Court in *Witherspoon* concluded that the Constitution is offended by the systematic exclusion from the jury forum of all veniremen who were conscientiously opposed to the death penalty.

In *Witherspoon* itself, for example, the trial judge early in the voir dire examination proclaimed, "Let's get these conscientious objectors out of the way, without wasting any time on them." 391 U.S. at 514. Almost half the entire panel was then excluded for varying degrees of opposition to the death penalty. Concluding that a jury "[c]ulled of all who harbored doubts about the wisdom of capital punishment" constituted "a jury uncommonly willing to condemn a man to die," one "organized to convict," and "a hanging jury," 391 U.S. at 520, 521, 523, the Court held that the only veniremen whose opposition to the death penalty can cause them to be excluded are those who make it "unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial of the case for them, or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*." (emphasis in original) 391 U.S. at 522 n.21.

Such veniremen, added the Court, cannot be "excluded on any broader basis than this . . ." *Id.* In *Boulden v. Holman*, 394 U.S. 478, 482 (1969), the Court reaffirmed that the prospective jurors' opposition to the death penalty must amount to a clear and unmistakable statement that they could never vote to impose it. And

in *Maxwell v. Bishop*, 398 U.S. 262, 264-66 (1970), the Court made it clear that equivocal responses cannot be a basis for exclusion.

By contrast, Tex. Penal Code Ann. §12.31(b) (Vernon) and its brief predecessor, Tex. Penal Code Ann. (1973), art. 1257 (Vernon), were not enacted until five years after *Witherspoon* was decided. In the wake of *Furman v. Georgia*, 408 U.S. 238 (1972), the Texas Legislature, like that of many other states, set about to enact a statutory means of imposing capital punishment that would not offend the Constitution. Like some other states, it elected to follow the advice of Chief Justice Burger's dissenting opinion in *Furman*, 408 U.S. at 375 *et seq.*, and enact a guided discretion statute.

Consequently, the capital murder statutes eventually enumerated as Tex. Penal Code Ann. §§19.02, 19.03 (Vernon), were promulgated, along with the fact questions at the punishment phase of the trial now included in Tex. Code Crim. Proc. Ann. art. 37.071 (Vernon). At the same time and as part of that debate,[8] it was believed appropriate statutorily to require prospective jurors in death penalty cases to swear that they would not manipulate the fact-finding process at either the guilt-innocence or punishment stages of trial, but that all fact questions at either stage would be answered truthfully. Jurors who could not promise that they would be guided in their deliberations by the statutory guidelines rather than their own subjective standards or desires, were not qualified to serve.[9]

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[8]*See Comment*, "House Bill No. 200: The Legislative Attempt to Reinstate Capital Punishment in Texas," 11 Hous. L.Rev. 410, 416-20 (1974); Tex. S.Jour. 63rd Legis., 1441-54, 1535, 1539, 1632-33, 1641, 1648 (1973); Tex. H. R.Jour., 63rd Legis., 3217-18, 3221-22, 3227, 4975-82 (1973).

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[9]This Court's decision in *Davis v. Georgia*, 429 U.S. 122 (1979), settles little or nothing in controversy in this case. (*Cf.* Brief for Petitioner at 18-19.) In fully applying the *Witherspoon* doctrine to the Georgia statutory scheme for imposing capital punishment, the Court certainly did not intend to answer every argument that might ever be raised in defense of different procedures in other states. And the Georgia statutory scheme as set forth and discussed in *Gregg v. Georgia*, 428 U.S. 153, 162-68 & nn.3-11 (1976), differs from that of Texas in at least two important ways. First, the Texas sentencing jury's discretion is more closely guided than that of a Georgia jury, although a similarly wide range of aggravating and mitigating evidence is admissible at the punishment stage of the bifurcated trial. Second, the Texas jury neither votes for nor recommends any sentence, whether death or life imprisonment, but only answers fact questions with known automatic results. These distinctions help to explain the decreased relevance of *Witherspoon* to Texas sentencing procedures, as discussed at length elsewhere herein.

Thus, §12.31(b) was not a reaction to *Witherspoon* at all, but was the product of Texas efforts to enact a scheme for imposing the death penalty that this Court might approve. The Legislature knew that the era of standardless sentencing in capital cases was over. The new era of guided discretion in jury sentencing seemed to call for jurors who could agree to subjugate their own attitudes about the death penalty *to the extent* that they might deliberate in an unbiased manner the punishment criteria set forth in the statute. The judgment of the Texas Legislature seemed vindicated in *Jurek v. Texas*, 428 U.S. 262 (1976).

2. Section 12.31(b) is a neutral basis for excluding jurors insofar as attitude toward the death penalty is concerned, and it was neutrally applied in this case.

If the exclusion of a venireman under Tex. Penal Code Ann. §12.31(b) (Vernon), violates the *Witherspoon* doctrine, self-evidently it is necessarily because the statute is a "broader basis" of excluding veniremen who oppose the death penalty than that authorized in *Witherspoon*, 391 U.S. at 522 n. 21. Certainly that is the thrust of Petitioner's argument, as it must be. For Petitioner, that approximately half the veniremen he

alleges were wrongfully excluded for cause in fact *favored* the death penalty, as he concedes (Brief for Petitioner at 21-25), is simply an "absurd result" (*id.* at 25) that inexplicably "presents the most egregious violation of *Witherspoon*," (*id.* at 24). For Respondent, by contrast, this circumstance, in addition to those discussed below in connection with the conduct of the entire voir dire examination, is the linchpin of his argument that the application of the statute neither increases or decreases the willingness of a jury to condemn an accused to death, but only eliminates from that jury those persons unable or unwilling to allow their discretion to be guided in the manner prescribed by the Texas Legislature and upheld by this Court in *Jurek*.

The charts appended to the Brief for Respondent illustrate the disposition of each of the one-hundred seven veniremen examined at Petitioner's trial. Twelve, of course, were accepted for jury service. Twenty-six were excused peremptorily, eleven by the state and fifteen by the defense. Twelve veniremen were excused by agreement because of insufficient time to devote to the long trial, poor health, or both. Fourteen were excused, twelve without objection, for bias about the case or a prior opinion of the guilt or innocence of Petitioner. Eight veniremen were excused because of an inability to consider either the proper range of punishment or probation in a murder case; four of these were excused without objection. In addition, two were excused because they would have demanded proof of motive in a murder case; one was excused by agreement because of irrational reactions to everyone's questions; one because she would have required the accused to testify in his own behalf; and one for no apparent reason.

The remaining thirty veniremen are of interest for present purposes because they were excluded for some combination of *Witherspoon* or §12.31(b). Of these thirty,

Petitioner has chosen ten whose exclusion allegedly violates the Constitution; the voir dire examinations of these ten appear in the Appendix (A. 3-52). The twenty veniremen he has chosen not to challenge were excluded upon the basis of some combination of *Witherspoon* and §12.31(b), and it is quite clear that each was properly excludable for either reason; one was dismissed by agreement.

Of the ten complained of veniremen,[10] at least three showed themselves to be excludable under the *Witherspoon* doctrine. Ferguson (VD 616; A. 15) viewed the death penalty as an inappropriate statutory punishment and was unalterably opposed to the imposition of death regardless of the facts and circumstances. White

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[10]Texas law provides that the prosecution and defense shall each have fifteen peremptory challenges in capital cases. Tex. Code Crim. Proc. Ann. art. 35.15 (Vernon). In this case the prosecution used only eleven of its challenges (*see* the Chart appended hereto). If the Court decides that between one and four of the ten veniremen whose exclusion Petitioner challenges were indeed excluded in violation of the *Witherspoon* doctrine, then the issue of whether the presence of unused peremptory challenges rendered each exclusion harmless would be presented. This is the question upon which the Court has once granted certiorari, *see Moore v. Illinois*, 403 U.S. 953, 954 (1971), and never decided because the case was ultimately decided on different grounds, *see Moore v. Illinois*, 408 U.S. 786 (1972). It is the issue that the dissenters in *Davis v. Georgia*, 429 U.S. 122, 123-24 (1979) — Mr. Justice Rehnquist, joined by the Chief Justice and Mr. Justice Blackmun — thought worthy of attention.

The essential argument, of course, is that a defendant could not have been harmed by the wrongful exclusion of a venireman that the prosecutor would have struck by use of a peremptory challenge if his objection to the qualifications of the prospective juror had been overruled. At bottom, the argument is one founded upon harmless error. *Chapman v. California*, 386 U.S. 18 (1967). Indeed, if the Court agreed as a factual matter that the prosecutor would have exercised a peremptory challenge upon each of the one to four hypothetical veniremen who were wrongfully excluded in this case, then it indisputably appears that the death sentence should be saved.

(VD 1531; A. 26) and Andrews (VD 2697; A. 34) both expressed a belief that the death penalty might be an appropriate statutory punishment, but neither personally could vote to assess that punishment regardless of the evidence. All three of these veniremen were also unable to take the oath to follow the law pursuant to §12.31(b).

Three of the ten, including Ferguson, initially expressed general opposition to the death penalty as an appropriate statutory punishment: Ferguson, Williams (VD 2571 *et seq.*; A. 30 *et seq.*); and McDonald (VD 4496; A. 42). Of these three, only Ferguson could never vote for the death penalty.

Of the seven veniremen who were essentially in favor of the death penalty as an appropriate statutory punishment, four stated that they could not or believed they could not personally sit upon any jury that might inflict the death penalty: White, Andrews, Giuffrida (VD 4443; A. 38) and Riddle (VD 4928; A. 50), who was more equivocal than the others.

Three other veniremen, Mahon (VD 33; A. 3), Jenson (VD 351; A. 9) and Coyle (VD 1023; A. 19) expressed both belief in capital punishment and professed their ability to impose it personally, but were unable to swear as required by §12.31(b) that they would answer the fact questions at the punishment stage of the trial totally upon the basis of the evidence presented.

If there is any characteristic common to these ten jurors, it is not their feelings upon the death penalty, which ran the gamut from approval of capital punishment, through approval of capital punishment plus inability to vote for it personally, to some degree of opposition to capital punishment. It is not willingness or lack of willingness to vote for a sentence of death.

Instead, it is the inability to take the oath that their

answers to the fact questions would not be affected by their knowledge of the necessary consequences of their answers to those questions.

The trial judge and the prosecutor explained repeatedly and in great detail that the purpose of this statutory phrase is to assure that each venireman would speak the truth upon the fact questions presented at the punishment stage of the trial, and that none would answer dishonestly in order to achieve the desired result, *whether life imprisonment or death.* In fact, with respect to the examination of these veniremen, both the trial judge and the prosecutor seemed willing to accept any juror who could take the oath to answer truly the questions, even though such a juror might properly be excluded under the *Witherspoon* doctrine.

For example, when venireman Ferguson gave an answer that appeared to exclude him under *Witherspoon*, the prosecutor not only failed to object, but seemed to attempt to *rehabilitate* him under §21.31(b). (VD 616 *et seq.*; A. 16 *et seq.*). Precisely the same sequence of events occurred with venireman White, to whom the prosecutor did not object when she gave an answer that would have excluded her under *Witherspoon*. (VD 1531; A. 26). When venireman Andrews gave an answer that would have excluded her under *Witherspoon* and the prosecutor did object for that reason, the trial judge suggested that the prosecutor might want to inquire under §12.31(b). The prosecutor apparently withdrew his objection and did so.

In fact, if one looks elsewhere in the voir dire examination, it appears that §12.31(b) was as much used as a basis of *saving* prospective jurors who might otherwise have been disqualified under *Witherspoon* as it was a basis for excluding prospective jurors. To these jurors, like the ten the exclusion of which Petitioner complains, the trial judge and prosecutor carefully explained the Texas statutory scheme and the proper role

of a juror at the punishment phase of a capital trial. There were at least *eight veniremen*[11] who gave answers disqualifying them from jury service under the *Witherspoon* doctrine and, rather than being excluded for that reason, they were further examined in an apparent effort to save them for jury service under §12.31(b). That the prosecutor would have instigated and participated in this process as he did exhibits an extraordinary understanding of the Texas statutes and a sensitivity to the purposes of *Witherspoon*. One of these veniremen, Thomas, was actually saved for jury service because of the rehabilitating inquiries under the Texas statute, although she was later disqualified for her inability to consider a sentence as low as five years imprisonment for the offense of murder (VD 2656).

It seems apparent that §12.31(b) was not only not used as a broader basis of excluding jurors against the death penalty than that allowed in *Witherspoon*; the statute was not used as a means of excluding jurors opposed to the death penalty *at all.*[12] In fact, it appears that it was as much used as a means of rehabilitating jurors who might otherwise have been excluded under *Witherspoon*, but for the unique nature of the Texas sentencing procedures at the punishment phase of capital trials, as it was used for a basis of excluding anyone.

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[11]The eight veniremen are Thomas (VD 2606-34); Andrews (VD 2692; A. 35); Heard (VD 3181-90); Crowe (VD 3685-91); Gadlin (VD 4411-12, 4415-17); Lewin (VD 4475-77); Coleman (VD 4906-12); and Smotherman (VD 4955-59).

[12]The contrast in this respect between the voir dire examination in Petitioner's case and that of *Burns v. Estelle*, 592 F.2d 1297 (5th Cir.) *reh. granted en banc*, 598 F.2d 1016 (5th Cir. 1979), is apparent.

This point illustrates a major flaw in Petitioner's argument that *Witherspoon* implements and Tex. Penal Code Ann. §12.31(b) destroys the capital defendant's right to "a jury drawn from a fair cross section of the community" as established in *Taylor v. Louisiana*, 419 U.S. 522, 527 (1975), and other authorities such as *Duren v. Missouri*, 439 U.S. 357 (1979), *Peters v. Kiff*, 407 U.S. 493 (1972), and *Duncan v. Louisiana*, 391 U.S. 145 (1968). The statute properly applied, as it was in this case, simply does not exclude any identifiable segment of society within the meaning of the cases Petitioner has cited. It is entirely neutral with respect to age, race, sex, social class, attitude toward the death penalty, and any other criterion conceivably relevant to the trial of a capital case.

Instead, the statute operates to exclude persons who cannot swear to follow the law, allow their deliberations to be guided by the statutory criteria, to deliberate in an unbiased manner, and to answer all fact questions honestly. The statute for these reasons is not a means of diluting or distorting the conscience of the community, but a means of preserving it in capital trials insofar as it allows any person to serve on a Texas jury, provided *only* that in the end he is capable of answering fairly and honestly the questions that the Texas Legislature and this Court have held are the appropriate ones for resolution of a capital defendant's fate.

B. The Reasoning of *Lockett v. Ohio*, 438 U.S. 586 (1978), Strongly Supports the Application of §12.31(b) in this Case.

Examination of the relevant portion of the Court's holding (Part II-B) in *Lockett v. Ohio*, 438 U.S. 586, 595-7 (1978), both clarifies and strengthens Respondent's position herein. Ohio procedure in capital cases of course provided for a jury to decide the guilt or innocence of the accused, but provided for imposition of

penalty only by a panel of three judges if the offender had been tried before the trial judge, or by the trial judge if the accused had been found guilty by a jury. This Court upheld the exclusion of four veniremen for their negative answers to the following question posed by the trial judge:

> [D]o you feel that you could take an oath to well and truely [sic] try this case . . . and follow the law, or is your conviction so strong that you cannot take an oath, knowing that a possibility exists in regard to capital punishment?

438 U.S. at 595-96. The Court noted that nothing in *Witherspoon* or any other of its decisions requires a state to empanel jurors who cannot follow the law and make impartial decisions in resolving factual questions that determine guilt or innocence. Further, the Court said that *Taylor v. Louisiana*, 419 U.S. 522 (1975), which stands for the proposition that due process requires juries chosen from a fair cross-section of the community, is not violated by excluding veniremen "who have explicitly indicated an inability to follow the law and instructions of the trial judge," *Lockett v. Ohio*, 438 U.S. at 596-97.

The Texas death penalty statute, which has been specifically approved by this Court in *Jurek v. Texas*, embodies fact questions at the *punishment*, as well as the guilt or innocence, stage of trial. Although the questions are ones of fact in the sense that they admit of a specific affirmative or negative answer, a broad range of evidence, both aggravating and mitigating, is relevant to the answers to those questions. *Cf. Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976).

Nevertheless, the questions provide coherent, specific guidelines for the jury that otherwise would have the unbridled discretion condemned in *Furman v. Georgia*.

Both the State of Texas and capital defendants are entitled to jurors who will follow the law at the punishment stage of trial no less than Ohio was entitled to jurors who could follow the law at the guilt or innocence stage of trial in *Lockett v. Ohio*. Under *Lockett*, veniremen who cannot assure that they will deliberate fact questions at the guilt or innocence stage of trial in accordance with the law's dictates and based upon the evidence shown at trial, are properly disqualified from jury service. It seems a short step indeed to uphold the exclusion of veniremen who cannot take the same oath at the punishment stage of trial in a state providing jury sentencing guided by deliberations upon fact questions. Indeed, to conclude otherwise would be to condone and perhaps even to guarantee capital jurors who will insist upon exercising their discretion in the unguided and standardless manner condemned in *Furman v. Georgia*.

CONCLUSION

For these reasons, the State of Texas respectfully prays that the judgment of the Texas Court of Criminal Appeals be affirmed.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT

CHART

VOIR DIRE EXAMINATION

CHART, VOIR DIRE EXAMINATION

Accepted Jurors (12)	Jurors Excused for Insufficient Time or for Poor Health (All Without Objection) (12)
Mrs. Willie Millhollon (VD 94)	Gary D. Henley (VD 249)
Mrs. Douglas Fain (VD 372)	Betty Comstock (VD 332)
Paul Matlock (VD 1419)	James M. Benton (VD 787)
Grady R. Mankin (VD 1726)	Robert E. Garnier (VD 1826)
Lester L. Hutchings (VD 2225)	Morris Holman (VD 2484)
Anita Pritchett (VD 2927)	Mary B. Fox (VD 4629)
Senora S. Burgess (VD 3201)	Maxine Shannon (VD 4640)
Carl M. Skooglund, Jr., (VD 3953)	Odessa Turknett (VD 4644)
Diane M. Lucien (VD 4051)	George W. Martindale (poor health)(VD 4656)
Doris A. Hooper (VD 4325)	Robert L. Vandemark (VD 4659)
Giles F. Feazel (VD 5157)	Jerry A. Hitt (VD 5003)
Elliott Ramey (VD 5642)	Mrs. Mammie Bennett (poor health)(VD 5302)

CHART, VOIR DIRE EXAMINATION
(Continued)

Peremptory Challenges by the Defense (15)	Peremptory Challenges by the Prosecution (11)
Rose Barnett (VD 522)	John P. Bennett (VD 441)
Leslie W. Goekler (VD 708)	John T. Rogers (VD 816)
Jack W. Lacy (VD 884)	Ralph B. Carnes (VD 1866)
E.H. Davis (VD 1091)	Dwain L. Hendrix (VD 2167)
Raymond Wagner (VD 1207)	C.W. Mowchan (VD 2345)
Charles F. Abbott (VD 1586)	Helen Mize (VD 2737)
Leon C. Cunningham (VD 2005)	Rosemary Reece (VD 2851)
Marlin H. Miller (VD 3003)	Mrs. Nolan Kelso (VD 3367)
Mrs. D.W. James (VD 3317)	John C. Davis (VD 3714)
David N. Loupot (VD 3463)	Lavelle Henderson (VD 5051)
Eva L. Sledge (VD 3561)	Bonnie Roper (VD 5533)
Mrs. H.N. Monroe (VD 3788)	
Marvin V. Elliott (VD 4571)	
Mrs. Marilyn Edwards (VD 4790)	
Betty Wakefield (VD 5397)	

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CHART, VOIR DIRE EXAMINATION
(Continued)

Jurors Excluded upon Basis of Witherspoon and/or §12.31(b) (20)	Excluded Jurors Complained of in These Proceedings (10)
Agreed or No Objection	Mrs. Forest Mahon (VD 33)
Albert F. Mallouf (VD 5304)	Forrest J. Jenson (VD 348)
	George C. Ferguson (VD 613)
Objections	Nelda Coyle (VD 1017)
Vivian B. Hill (VD 234)	Mrs. Lloyd White (VD 1525)
Virginia M. Brown (VD 778)	Curtis Williams (VD 2571)
Myrtle H. Hones (VD 860)	Bobbie Andrews (VD 2692)
David Gray (VD 910)	Anthony Giuffrida (VD 4443)
Helen Roper (VD 935)	Penny L. McDonald (VD 4492)
Susan Weber (VD 1072)	Dorothy G. Riddle (VD 4920)
Beny L. Vergati (VD 1567)	
Leon P. Bomar, III (VD 1846)	
Walter Heard (VD 3167)	
A.M. Crowe (VD 3679)	
Forest E. Gadlin (VD 4403)	
Vallie M. York (VD 4428)	
Leslie J. Lewin (VD 4469)	
Cyril F. Vincent (VD 4661)	
Dorothy Bragg (VD 4714)	
Davenia C. Coleman (VD 4899)	
Gerry E. Smotherman (VD 4948)	
Barbara A. Dickson (VD 5124)	
Mrs. Bobby L. Rodgers (VD 5607)	

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CHART, VOIR DIRE EXAMINATION
(Continued)

Jurors Excused for Bias or Prior Opinion of Defendant's Guilt or Innocence (14)

Agreed or No Objection

Mrs. Bob Johnson (VD 71)
Faye Morriss (VD 272)
Constance J. Preston (VD 796)
Julanna Longorio (VD 948)
Jeanette M. Hester (VD 1686)
Jeffery Gardner (VD 2571)
B.R. Mathis (VD 3555)
Betsy J. Fustejousky (VD 3707)
Fellene Mack (VD 4464)
Robert R. Fegraeus (VD 4637)
Patricia A. Mikus (VD 5097)
William C. Adams (VD 5276)

Objections

Yvonne B. Lowerre (VD 2437)
Bob L. Bailey (VD 3881)

CHART, VOIR DIRE EXAMINATION
(Continued)

Jurors Excused for Inability to Consider Range of Punishment or Probation (8)

Agreed or No Objection

Eleanore Porter (VD 632)
Laura S. Gummelt (VD 2092)
Peggy Stines (VD 3133)
Oleta M.McDowell (VD 4232)

Objections

Ben H. Kelly (VD 1362)
Christine Thomas (VD 2606)
Mrs. Pat Pinzel (VD 4163)
Bobby J. Berry (VD 4848)

Miscellaneous Exclusions (5)

Mildred Talley
(would demand proof of motive; objection)(VD 958)

Cleotha Pellum
(irrational responses; no objection)
(VD 2677)

Charles H. White
(would demand proof of motive; objection)
(VD 4683)

Ms. Ronald E. Roland
(would require defendant to testify; no objection)
(VD 4734)

Marion B. Jett
(no reason; no objection)
(VD 5363)